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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Federal-State Joint Board on Universal Service

Petition for FCC Agreement in Redefining)
the Service Areas of Citizens)
Telecommunications Company of West)
Virginia, dba Frontier Communications of)
West Virginia in the State of West)
Virginia Pursuant to 47 C.F.R. Section)
54.207(c))
)

CC Docket No. 96-45

**PETITION OF THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA
FOR FCC AGREEMENT IN REDEFINING
RURAL TELEPHONE COMPANY SERVICE AREAS**

October 20, 2004

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Summary

The Public Service Commission of the State of West Virginia ("PSCWV") files this Petition pursuant to the provisions of 47 C.F.R. § 54.207(c). Under that rule, a state commission may petition the FCC for its concurrence to redefine the service areas of rural Incumbent Local Exchange Carriers ("ILECs") as something other than the ILECs' entire study areas. Redefinition of the service area of Citizens Telecommunications Company of West Virginia, dba Frontier Communications of West Virginia ("Frontier"), a rural ILEC, along wire center boundaries is necessary in connection with the PSCWV's recent designation of Hardy Telecommunications, Inc. (hereinafter referred to as Hardy) as an eligible telecommunications carrier ("ETCs") for purposes of receiving high-cost support from the federal universal service program. Because Hardy's licensed service territories do not correlate with the rural ILEC's service area, the Act provides that the rural ILEC's service area must be redefined before designation in those areas can take effect. Consistent with PSCWV's designation orders and with previous actions taken by the FCC and several other states, redefinition is requested such that the service areas of Frontier be redefined to permit Hardy to be designated an ETC in the wire center of Bluefield.

The proposed redefinition is warranted under the Commission's competitively neutral universal service policies, and it constitutes precisely the same relief granted to similarly situated carriers by the Commission and several states. Unless the relevant ILEC service areas are redefined, Hardy will be unable to use high-cost support to improve and to expand its service to consumers in many areas of its licensed service territory, and consumers will

be denied the benefits. Moreover, the requested redefinition satisfies the analysis provided by the Federal-State Joint Board on Universal Service ("Joint Board") in that it reduces opportunities for payment of uneconomic support to Hardy, duly recognizes the special status of rural carriers under the 1996 Act, and does not impose undue administrative burdens on ILECs. Finally, the FCC's *Highland Cellular* order does not prohibit the requested redefinition, because the proposed redefinition meets *Highland Cellular's* requirements.

The redefinition proposed herein is well-supported by the record at the state level, and all affected parties were provided ample opportunity to ensure that the Joint Board's recommendations were taken into account. Accordingly, PSCWV requests that the FCC grant its concurrence expeditiously and allow the proposed redefinition to become effective without further action.

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Federal-State Joint Board on Universal Service)	CC Docket No. 96-45
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Petition for FCC Agreement in Redefining the Service Areas of Citizens Telecommunications Company of West Virginia, dba Frontier Communications of West Virginia in the State of West Virginia Pursuant to 47 C.F.R. Section 54.207(c))	

**PETITION OF THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA
FOR FCC AGREEMENT IN REDEFINING
RURAL TELEPHONE COMPANY SERVICE AREAS**

The Public Service Commission of the State of West Virginia ("PSCWV") submits this Petition seeking the FCC's agreement with the redefinition of the service areas of Citizens Telecommunications Company of West Virginia, dba Frontier Communications of West Virginia ("Frontier"), a rural incumbent local exchange carrier ("ILEC"), so that each of Frontier's wire centers constitutes a separate service area. Hardy Telecommunications, Inc. (hereinafter referred to as Hardy) has been conditionally designated an ETC in the wire centers of Moorefield, pending a grant of FCC concurrence with the redefinition proposed

herein.¹

The redefinition will foster federal and state goals of encouraging competition in the telecommunications marketplace and extending universal service to rural West Virginia's consumers.

I. BACKGROUND

Pursuant to Section 214(e) of the Communications Act of 1934, as amended (the Act), state commissions generally have authority to designate carriers that satisfy the requirements of the federal universal service rules as ETCs and to define their service areas.²

The service area of a rural ILEC is defined as its study area. However, the Act explicitly sets forth a process whereby a competitive ETC may be designated for a service area that differs from that of the ILEC, provided the rural ILEC's service area is redefined. Specifically, Section 214(e) of the Act provides:

"Service area" means such company's "study area" unless and until the Commission and the States, after taking into account recommendations of a Federal-State Joint Board instituted under Section 410(c), establish a different definition of service area for such company.³

The FCC and the Federal-State Joint Board on Universal Service ("Joint Board") have recognized that a strict rule requiring a competitive ETC to serve an area exactly

¹ Frontier has three separate study areas in West Virginia: Mountain State, St. Mary, and Bluefield. The redefinition requested in this Petition pertains to all three of Frontier's West Virginia study areas.

² 47 U.S.C. § 214(c).

³ *Id.*

matching a rural ILEC's study area would preclude competitive carriers that fully satisfy ETC requirements from bringing the benefits of competition to consumers throughout their service territory.⁴ The FCC has established a streamlined procedure for the FCC and states to act together to redefine rural ILEC service areas.⁵ Using this procedure, the FCC and state commissions have applied the Joint Board's recommendations and concluded that it is necessary and appropriate to redefine the ILEC service areas to permit the designation of competitive ETCs in those areas.⁶

Hardy was designated ETC status on August 27, 2004.⁷ In the designation orders, PSCWV concluded that a grant of ETC status would serve the public interest, and that Hardy should be designated in those Frontier wire centers that Hardy committed to serve completely.

⁴ See *Petition for Agreement with Designation of Rural Company Eligible Telecommunications Carrier Service Areas and for Approval of the Use of Disaggregation of Study Areas for the Purpose of Distributing Portable Federal Universal Service Support, Memorandum Opinion and Order*, CC Docket No. 96-45, DA 99-1844, 15 FCC Rcd 9921, 9927 at ¶ 8 n. 40 (rel. Sept 9, 1999) (“*Washington Redefinition Order*”), citing *Federal-State Joint Board on Universal Service, Recommended Decision*, 12 FCC Rcd 87, 181 (1996) (“*Joint Board Recommended Decision*”).

⁵ See 47 C.F.R. § 54.207(c). See also *Federal-State Joint Board on Universal Service, Report and Order*, 12 FCC Rcd 8776, 8881 (1997) (“*First Report and Order*”).

⁶ See, e.g., *Public Notice, Smith Bagley, Inc. Petitions for Agreement to Redefine the Service Areas of Navajo Communications Company, Citizens Communications Company of the White Mountains, and CenturyTel of the Southwest, Inc. On Tribal Lands Within the State of Arizona*, CC Docket No. 96-45, DA 01-409, 16 FCC Rcd 3558 (rel. Feb 15, 2001); *Washington Redefinition Order, supra*, 15 FCC Rcd at 9927-28.

⁷ See *Hardy Order*.

PSCWV also found that Hardy's request to redefine Frontier's service areas satisfied the Joint Board's concerns. PSCWV further concluded that a petition should be filed to obtain the FCC's concurrence with the proposed redefinition.

PSCWV submits this Petition for concurrence, in accordance with the Hardy designation order, the Act and the FCC's rules. Specifically, the PSCWV seeks concurrence for redefinition that would involve redefining Frontier's Bluefield study area. Specifically, the *Hardy Order* of the PSCWV calls for a redefinition of Frontier's study area to permit Hardy and to be designated an ETC in the Moorefield exchange area.⁸

II. DISCUSSION

The FCC should grant this Petition because (1) the requested redefinition is consistent with federal Universal Service policy, (2) the requested redefinition satisfies the three Joint Board factors under Section 54.207(c)(1) of the Commission's Rules. Ultimately, redefinition along wire center boundaries will advance the universal service goals of promoting quality service at just, reasonable, and affordable rates; access to advanced information services; and access for rural consumers to telecommunications services and rates that are comparable to those available to urban consumers.⁹ The proceedings at the state level provided all affected parties with an opportunity to comment on the proposed

⁸ See, *Hardy Order*.

⁹ See 47 U.S.C. § 254(b).

redefinition, and PSCWV fully considered and addressed the parties' arguments on this subject.¹⁰ The PSCWV record well supports the proposed redefinition, and the orders designating Hardy provide the FCC with ample justification to concur.

A. The Requested Redefinition Is Consistent With Federal Universal Service Policy.

Congress, in passing the 1996 amendments to the Act, declared its intent to "promote competition and reduce regulation" and to "encourage the rapid deployment of new telecommunications technologies."¹¹ As part of its effort to further these goals, Congress enacted new universal service provisions that, for the first time, envision multiple ETCs in the same market.¹² In furtherance of this statutory mandate, the FCC has adopted the principle that universal service mechanisms be administered in a competitively neutral manner, meaning that no particular type of carrier or technology should be unfairly advantaged or disadvantaged.¹³ Consistent with this policy, the FCC and many state

¹⁰ Frontier is the only ILEC to be affected by the redefinition and it participated fully as an active Intervenor in both cases.

¹¹ Pub. L. No. 104-104, 110 Stat. 56 (1996) (preamble).

¹² See 47 U.S.C. § 214(e)(2).

¹³ See *First Report and Order, supra*, 12 FCC Rcd at 8801. Competitive neutrality is a "fundamental principle" of the FCC's universal service policies. *Guam Cellular and Paging, Inc., Petition for Waiver of Section 54.314 of the Commission's Rules and Regulations*, CC Docket No. 96-45, DA 03-1169, 18 FCC Rcd 7138, 7141 at ¶ 7 (rel. April 17, 2003). Moreover, the FCC has requested that the Joint Board "should address how its recommendations . . . further the universal service goals outlined in section 254 of the Act, including the principle of competitive neutrality." See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, FCC 02-307, 17 FCC Rcd 22642, 22645 at ¶ 6 (rel. Nov. 7, 2002) ("Referral Order").

commissions have affirmed that ETC service areas should be defined in a manner that removes obstacles to competitive entry.¹⁴ In 2002, for example, the FCC granted a petition of the Colorado Public Utilities Commission ("CPUC") for a service area redefinition identical in all material respects to the redefinition proposed in this Petition.¹⁵ In support of redefining CenturyTel's service area along wire-center boundaries, the CPUC emphasized that "in CenturyTel's service area, no company could receive a designation as a competitive ETC unless it is able to provide service in 53 separate, non-contiguous wire centers located across the entirety of Colorado. . . . [T]his constitutes a significant barrier to entry."¹⁶ The FCC agreed and, by declining to open a proceeding, allowed the requested redefinition to take effect.¹⁷ The FCC similarly approved a petition by the Washington Utilities and Transportation Commission ("WUTC") and about 20 rural ILECs for the redefinition of the ILECs' service areas along wire center boundaries, finding that:

[O]ur concurrence with rural LEC petitioners' request for designation of their individual exchanges as service areas is warranted in order to promote competition. The Washington Commission is particularly concerned that rural areas . . . are not left behind in the move to greater competition. Petitioners

¹⁴ See, e.g., *First Report and Order*, *supra*, 12 FCC Rcd at 8880-81; *Petition by the Public Utilities Commission of the State of Colorado to Redefine the Service Area of CenturyTel of Eagle, Inc., Pursuant to 47 C.F.R. § 54.207(c)*, at p. 4 (filed with the FCC Aug. 1, 2002) ("CPUC Petition").

¹⁵ See CPUC Petition at p. 5 ("Petitioner requests agreement to redefine CenturyTel's service area to the wire center level").

¹⁶ CPUC Petition at p. 4.

¹⁷ CenturyTel has petitioned the FCC to reconsider its decision. However, as of this date CenturyTel's service area redefinition is effective.

also state that designating eligible telecommunications carriers at the exchange level, rather than at the study area level, will promote competitive entry by permitting new entrants to provide service in relatively small areas . . . We conclude that this effort to facilitate local competition justifies our concurrence with the proposed service area redefinition.¹⁸

Other state commissions have similarly concluded that redefining rural ILEC service areas along wire center boundaries is fully justified by the pro-competitive goals of the 1996 Act. For example, in a decision that was later adopted by the Minnesota Public Utilities Commission, an administrative law judge ("ALJ") recommended approval of Midwest Wireless Communications L.L.C.'s proposal to redefine certain rural ILEC service areas to the wire center level.¹⁹ Specifically, the ALJ concluded "[t]he service area redefinition proposed by Midwest will benefit Minnesota consumers by promoting competitive entry and should be adopted."²⁰ Similar conclusions were reached in decisions granting ETC status to wireless carriers in Arizona, New Mexico, and Maine.²¹

As in those cases, PSCWV believes that the redefinition requested in the instant

¹⁸ *Washington Redefinition Order, supra*, 15 FCC Rcd at 9927-28 (footnotes omitted).

¹⁹ *Midwest Wireless Communications, L.L.C.*, OAH Docket No. 3-2500-14980-2, PUC Docket No. PT6153/AM-02-686, Findings of Fact, Conclusions of Law, and Recommendation at ¶¶ 53-59 (Minn. ALJ Dec. 31, 2002), *aff'd* by Minn. PUC March 19, 2003 (petition for concurrence pending before FCC).

²⁰ *Id.* at ¶ 59.

²¹ See *Smith Bagley, Inc.*, Docket No. T-02556A-99-0207 (Ariz. Corp. Comm'n Dec. 15, 2000) (FCC concurrence granted May 16 and July 1, 2001); *Smith Bagley, Inc.*, Utility Case No. 3026, Recommended Decision of the Hearing Examiner and Certification of Stipulation (N.M. Pub. Reg. Comm'n Aug. 14, 2001), adopted by Final Order (Feb. 19, 2002) (FCC concurrence granted June 11, 2002); *RCC Minnesota, Inc. et al.*, Docket No. 2002-344 (Me. PUC May 13, 2003).

proceeding will enable Hardy to make the network investments necessary to bring competitive service to people throughout their ETC service areas. Redefinition will bring about variety in pricing packages and service options on par with those available in urban and suburban areas.²² The use of high-cost support for infrastructure investment will bring improved wireless service and important health and safety benefits associated with increased levels of radio frequency coverage.

**B. The Requested Redefinition Satisfies the Three Joint Board Factors
Under Section 54.207(c)(1) of the Commission's Rules.**

A petition to redefine an ILEC's service area must contain "an analysis that takes into account the recommendations of any Federal-State Joint Board convened to provide recommendations with respect to the definition of a service area served by a rural telephone company."²³ In the *Recommended Decision* that laid the foundation for the FCC's *First Report and Order*, the Joint Board enumerated three factors to be considered when reviewing a request to redefine a LEC's service area.²⁴ Those factors are addressed below.

1. Hardy is not cream skimming.

²² See 47 U.S.C. § 254(b)(3).

²³ See Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. at 113 (stating that the 1996 Act was designed to create "a pro-competitive, de-regulatory national policy framework" aimed at fostering rapid deployment of telecommunications services to all Americans "by opening all telecommunications markets to competition.").

²⁴ 47 C.F.R. § 54.207(c)(1). See *RCC Order* at 7; *USCC Order* at 7.

First, the Joint Board expressed concern as to whether the competitive carrier is attempting to "cream skim" by only proposing to serve the lowest cost exchanges.²⁵ After an extensive analysis, the PSCWV found that designation of Hardy as an ETC in its respective proposed area does not result in cream skimming.²⁶ Hardy proposed ETC service areas that are coterminous with wire centers in their licensed service territories, and have committed to offer service to customers throughout their designated ETC service areas upon reasonable request. PSCWV's designation orders do not grant ETC status to Hardy for any partial wire centers.²⁷ In sum, Hardy's application to serve as ETC, as approved by the PSCWV, does not permit them to serve only low-cost areas.

Opportunities for receiving uneconomic levels of support are further diminished by the FCC's decision to allow rural ILECs to disaggregate support below the study-area level.²⁸ By moving support away from low-cost areas and into high-cost areas, ILECs have the ability to minimize or eliminate cream skimming and the payment of uneconomic support to competitors.²⁹

²⁵ *Joint Board Recommended Decision, supra.*

²⁶ *See Joint Board Recommended Decision*, 12 FCC Rcd at 180.

²⁷ *See Hardy Order.*

²⁸ In the Easterbrooke Order, Easterbrooke was given the option of either withdrawing the Walkersville, Thomas and Davis wire centers from its ETC designated territory, or seeking a certificate of convenience and necessity from PSCWV in order to serve those areas of the three wire centers located outside of WV RSA as a competitive local exchange carrier ("CLEC").

²⁹ *See Federal-State Joint Board on Universal Service, Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and*

A review of the disaggregation filing submitted by Frontier reveals that cream skimming is not a concern in this case. Frontier elected to disaggregate support under Path 3 by self-certifying disaggregation plans that went into effect immediately upon being filed.³⁰ This plan has effectively moved higher levels of support away from lower-cost, higher-density areas and to areas where costs are higher and service is needed most - thus reducing or eliminating the possibility of Hardy or any other competitive ETCs that may yet be designated, receiving uneconomic support. In its *Fourteenth Report and Order*, the FCC placed upon rural ILECs the burden of disaggregating support if they believe disaggregation is in their best interest.³¹

2. The PSCWV considered Frontier's special status.

Second, the Joint Board recommended that the FCC and the States consider the rural carrier's special status under the 1996 Act.³² The PSCWV did so when granting Hardy's application for ETC designation. The PSCWV weighed numerous factors in ultimately determining that such designations were in the public interest. Congress mandated this

Interexchange Carriers, Fourteenth Report and Order, twenty-second Order on Reconsideration, and Further Notice of Proposed Rulemaking, CC Docket No. 96-45, FCC 01-157; 16 FCC Rcd 11244 (rel. May 23, 2001) ("*Fourteenth Report and Order*").

³⁰See *Federal-State Joint Board on Universal Service, Western Wireless Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota, Memorandum Opinion and Order*, 16 FCC Rcd 18133, 18141 (2001).

³¹ A checklist of disaggregation filings made by West Virginia ILECs is available on USAC's web site at <http://www.universalservice.org/hc/disaggregation/checklist/westvirginia.xls>.

³² See *Fourteenth Report and Order*, 16 FCC Rcd 11244.

public-interest analysis in order to protect the special status of rural carriers in the same way it established special considerations for rural carriers with regard to interconnection, unbundling, and resale requirements.³³ No action in this proceeding will affect or prejudice any future action the PSCWV or the FCC may take with respect to any ILEC's status as a rural telephone company, and nothing about service area redefinition will diminish a rural ILEC's status as such.

3. Frontier will face no undue administrative burden.

Third, the Joint Board recommended that the FCC and the States consider whether rural ILECs would face an undue administrative burden as a result of the proposed redefinition.³⁴ There is no undue burden in this case. The proposal to redefine Frontier's service areas along wire center boundaries is made solely for ETC designation purposes. Defining service areas in this manner will in no way impact the way Frontier calculates its costs but is solely to enable newly designated competitive ETCs to begin receiving high-cost support in those areas in the same manner as Frontier. Frontier may continue to calculate costs and submit data for purposes of collecting high-cost support in the same manner as it does now.

C. The FCC's Recent Highland Cellular Order Does Not Prohibit the Requested Redefinition.

³³ See *Joint Board Recommended Decision*, 12 FCC Rcd at 180.

³⁴ See *id.*

The record in these proceedings clearly shows that Hardy has met the standards of *Highland Cellular*. First, Hardy was designated in areas that do not include only portions of rural ILEC wire centers; therefore, the requested redefinition does not run afoul of the FCC's current policy concerning designation in partial wire centers, as set forth in *Highland Cellular*.

Additionally, the requested redefinition satisfies the cream skimming analysis set forth in *Highland Cellular*. *Highland Cellular* contained a more detailed analysis of cream skimming than that required by the Joint Board factors listed above that involved review of population densities and projected costs of service. In that case, the FCC granted Highland Cellular's ETC designation for most of the requested study areas but denied ETC designation for the study area of certain rural carriers where Highland Cellular's licensed service area did not fully cover the study areas.³⁵ The FCC did so because it found that Highland Cellular would be cream skimming by largely serving the lowest-cost customers in the study areas. In the study area of Verizon South, the FCC concluded that four of the wire centers served by Highland Cellular were the four highest-density "and thus presumably lowest-cost wire centers in Verizon South's study area."³⁶ The FCC determined that "94 percent of Highland Cellular's potential customers in Verizon South's study area would be located in [four of the

³⁵ *See id.*

³⁶ *Highland Cellular* at ¶ 1.

six wire centers served by Highland Cellular]."³⁷ The FCC then denied the application as to all six wire centers in the Verizon South study area.³⁸ The FCC engaged in a similar analysis regarding the Saltville wire center of United Telephone Company and reached the same conclusions.³⁹

Unlike *Highland Cellular*, Hardy's customers tend to be in the lowest-density rural ILEC wire centers. The evidence in the record of Hardy's designation dockets showed that Hardy clearly satisfy the *Highland Cellular* test with respect to Frontier's relevant study areas.

³⁷ *Highland Cellular* at ¶ 31.

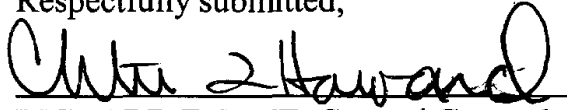
³⁸ *Highland Cellular* at ¶ 31.

³⁹ *Highland Cellular* at ¶ 32.

III. CONCLUSION

PSCWV has found that Hardy's use of high-cost support to increase the availability of competitive services and to invest in rural infrastructure development will serve the public interest.⁴⁰ Yet, without the FCC's concurrence with the Frontier service area redefinition proposed herein, consumers will not be able to experience those benefits in many areas in which Hardy is authorized by the FCC to provide service. The redefinition requested in this Petition will enable Hardy's ETC designation to take effect throughout its designated ETC service areas in West Virginia. Accordingly, PSCWV requests that the Commission grant its concurrence with the proposal to redefine Frontier's service area so that each of Frontier's wire centers constitutes a separate service area.

Respectfully submitted,



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⁴⁰ See *Hardy Order* at 24-27.

**PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON**

At a session of the PUBLIC SERVICE COMMISSION OF WEST VIRGINIA in the City of Charleston on the 27th day of August, 2004.

CASE NO. 03-0305-T-PC

HARDY TELECOMMUNICATIONS, INC.

Petition for consent and approval for Hardy Telecommunications, Inc. to become an eligible telecommunications carrier.

COMMISSION ORDER

This case involves Hardy Telecommunications Inc.'s (Hardy) petition to be designated an eligible telecommunications carrier (ETC) in the Moorefield exchange, which is also served by Citizens Telecommunications of West Virginia dba Frontier Communications of West Virginia (Frontier). The Administrative Law Judge entered a Recommended Decision, granting Hardy ETC status in the Moorefield exchange, with various conditions. Both Frontier and the Consumer Advocate Division (CAD) filed exceptions. The Commission adopts the Recommended Decision, with one exception, and imposes additional conditions.

GENERAL FACTUAL BACKGROUND

Hardy Telecommunications' Background Information

Hardy is a wire line, local exchange carrier certificated to provide telecommunications service in Grant, Hampshire, Hardy and Pendleton counties. Hardy is both a telephone cooperative and a rural telephone company. In two exchanges in Hardy County (i.e. Lost River and South Fork), Hardy operates as an incumbent local exchange carrier (ILEC). In the remainder of its certificated service territory, Hardy is authorized to operate as a facilities-based competitive local exchange carrier (CLEC). See CAD's Initial Brief at p. 3; CAD Exhibit 1 at p 2.

The Commission previously designated Hardy as an ETC for its ILEC service area. *Id.* Hardy's current petition covers the remainder of its certificated territory in Hardy County, which consists of one exchange (Moorefield), which is also served by Frontier. *Id.* at 4. Hardy currently serves approximately 270 customers, representing 300 access lines out of 3,200 total lines in the Moorefield exchange. *Id.*

Hardy's petition is limited to the Moorefield exchange in Frontier's Bluefield study area. *Id.* at p. 5. This area received approximately \$1,123,689 in monthly high cost support (\$13,483,000 annualized), based on information for the 4th Quarter 2003. *Id.* This works out to \$11.97 in support per line per month. Because Frontier disaggregated its high cost support, support within the Bluefield study area varies by wire center. *Id.* Under its disaggregation plan, the Moorefield exchange receives \$37.01 per line per month in high cost support. *Id.*

Intervenor Frontier's Background Information

Frontier is an incumbent wire line telecommunications company serving over 150,000 customers in 34 West Virginia counties. *See* CAD's Initial Brief, p. 4; Frontier Petition to Intervene p. 1; and Frontier Exhibit 1, pp. 4-5. Frontier is a rural telephone company (RTC) and its service territory is divided into three study areas representing the service territories of three different telephone companies acquired by Frontier over the years: 1) Bluefield study area (wire centers previously served by General Telephone Co., located primarily in Mercer and McDowell Counties and a portion of the Eastern Panhandle, serves 93,847 access lines); 2) St. Mary's study area (wire centers previously served by Contel and scattered throughout state, serves 36,981 access lines); 3) Mountain State study area (wire centers originally served by Mountain State Telephone Co., located primarily in Webster and Pocahontas counties and rural portions of other counties, serves 25,889 access lines). *Id.*, Frontier Exhibit 1 p. 5; and CAD Exhibit 1 p. 3. Frontier receives approximately \$32 million annually in federal high-cost support for its three study areas. *See* CAD's Initial Brief p. 5.

The Bluefield study area encompasses a large but non-contiguous geographic territory in West Virginia, extending from the very southernmost portion of the state along the Virginia-West Virginia border in Mercer County to the Eastern Panhandle. *See* Recommended Decision at p. 25.

PROCEDURAL BACKGROUND¹

On March 3, 2003, Hardy filed a petition, pursuant to Section 214(e)(2) of the federal Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the Act), requesting designation as an ETC to receive support from the federal universal service program in Frontier's Moorefield service area. Hardy's petition indicated it currently provides competitive local exchange services in Frontier's Moorefield service area. Hardy argued that it fulfills all the criteria for designation as an ETC and that such designation would be in the public interest.

By Order entered April 25, 2003, intervenor status was granted to the CAD and Frontier. This matter was also referred to the Division of Administrative Law Judges (ALJ).

In response to options given by the ALJ in a Procedural Order, the CAD filed a joint response on behalf the CAD, Hardy and Frontier. According to the joint response, while the parties agreed a number of the issues relevant to Hardy's ETC petition could be resolved by stipulation, there were several issues that were not identical to those being considered by the Commission in the pending *Highland Cellular, Inc.* proceeding (*Highland Cellular*)², on which the parties wished to conduct discovery and which could warrant development at hearing, including the CAD's proposed benchmarking standard; the fact that the wire centers in Frontier's service territory in which Hardy seeks ETC status are not the same as those for which Highland Cellular sought ETC status and there may be different considerations relating to Hardy's ability to serve those wire centers; and the fact that Hardy, unlike Highland Cellular, is not limited by regulation from building its own network using its preferred technology outside of the area for which it seeks ETC designation. The parties did not wish to agree to a settlement resting entirely on *Highland Cellular* and did not wish to wait for a ruling on the public interest issue in that case, since it would not address the CAD's benchmarking proposal. The parties opted to litigate this case.

On November 7, 2003, Commission Staff (Staff) filed a Final Joint Staff Memorandum and recommended that the parties stipulate that if the Commission upholds the Recommended Decision in *Highland Cellular*, Hardy also would be entitled to ETC

¹A detailed account of the procedural history in this case is set forth in the Recommended Decision, entered on May 14, 2004. The Recommended Decision also sets forth specific arguments made in initial pleadings.

²*Highland Cellular, Inc.*, Case No. 02-1453-T-PC.

designation in Frontier's territory. If the parties would not stipulate, Staff recommended this case be held in abeyance, pending the issuance of the Commission's decision in *Highland Cellular*. Staff also recommended Hardy be required to comply with any additional conditions or requirements established in Case No. 03-1199-T-GI.³

On November 18, 2003, Frontier filed a response to Staff's final memorandum, arguing that *Highland Cellular* and this case are not sufficiently alike to rely upon that case to decide the Hardy ETC application.

On December 23, 2003, Hardy and Frontier filed prepared direct testimony. Thereafter and subsequent to the ALJ's granting of an extension, Frontier and the CAD filed prepared rebuttal testimony on January 16, 2004. Frontier, on the same date, also moved to strike portions of the pre-filed testimony of Hardy witness Dwight Welch.

On January 27, 2004, subsequent to the postponement of the scheduled hearing due to a winter storm, the parties jointly moved the Chief ALJ to cancel the hearing. To expedite the processing of the case, the parties agreed to submit the case on the basis of their pre-filed testimony.

By Procedural Order entered on January 27, 2004, the Chief ALJ granted the request and cancelled the scheduled hearing. Thereafter, Hardy, Frontier and the CAD filed either initial briefs and/or proposed orders. Frontier and the CAD thereafter filed reply briefs.

Recommended Decision

A Recommended Decision was entered on May 14, 2004, granting Hardy's petition for ETC designation in the Moorefield Exchange. The Chief ALJ conditioned the designation upon the following: 1) Hardy shall serve the entire Moorefield exchange, either through its own facilities or a combination of its own and Frontier's facilities; 2) Hardy shall comply with the advertising requirements established in this Commission's

³The General Investigation was instituted with regard to establish conditions to grant ETC status to carriers and establish uniform standards determine ETC compliance with applicable federal requirements regarding use of federal USF money provided to ETCs. A Recommended Decision was entered in the GI case on July 1, 2004. Exceptions to the Recommended Decision have been filed by the CAD, the Independent Group, and Frontier.

*Gateway*⁴ decision; and 3) Hardy shall comply with any other restrictions or requirements imposed upon ETC designees in *Highland Cellular*. The Chief ALJ also ordered Staff to file the appropriate petition with the FCC, within 60 days, seeking concurrence in the redefinition of Hardy's service area for ETC purposes as being the entirety of Frontier's Moorefield exchange.

The Chief ALJ set forth, in detail, the evidence presented by the parties through the submitted direct and rebuttal testimonies.

The Chief ALJ explained that there was no dispute for most of the elements which must be demonstrated to obtain ETC designation by an applicant. Hardy is a common carrier. It is the incumbent LEC for its own service territory and it is a competitive LEC in the portions of those same counties where it is not the incumbent, with the exception of the service territory of Spruce Knob-Seneca Rocks Telephone Company. Hardy is already offering to 270 customers the nine services supported by the universal service mechanism. Therefore, it is clearly offering or capable of offering the nine supported services. Further, the Chief ALJ noted that according to witness testimony, Hardy was not just seeking to provide service in the town of Moorefield, but would commit to providing service throughout the entire Moorefield exchange and would comply with any ETC requirements on serving the whole exchange area. Thus, it has met the requirement of committing to offer those services throughout the designated service area. The Chief ALJ also found Hardy is also extensively advertising the availability of its services and their charges as verified by the advertising and media information attached to its petition filed on March 3, 2003, and also as verified by the fact that Frontier acknowledges that Hardy is a competitor and that Frontier has lost a number of customers to Hardy. Finally, Hardy must offer Link Up and Lifeline services as part of its service offerings to low-income subscribers.

The Chief ALJ explained the issue in this proceeding was whether it is in the public interest to designate Hardy as an ETC in Frontier's Moorefield exchange. The Chief ALJ specifically addressed the evidence pertaining to Hardy's local presence in the Moorefield exchange, Frontier's own improvement efforts since Hardy's entrance to the market in the Moorefield exchange, and Hardy's investment of significant capital to overbuild Frontier's network in Moorefield. As explained by the Chief ALJ, Hardy's witness promised that, if Hardy obtained USF support, it would flow any revenues it receives back into the community. Hardy's witness also pointed out that, no matter what

⁴*Gateway Telecomm, LLC dba StratusWave Communications*, Case No. 00-1656-T-PC (May 4, 2001, Commission Order).

amount of USF support Hardy ultimately receives, under current FCC rules, Frontier's USF support will not decrease.

The Chief ALJ acknowledged the FCC's most recent pronouncement on designating an additional ETC in an RTC service area - that the value of increased competition, by itself, is not sufficient to satisfy the public interest test in rural areas.⁵ Rather, one must weigh numerous factors, including the benefits of increased competitive choice, the impact of multiple designations on the Universal Service Fund (USF), the unique advantages and disadvantages of the competitor's service offerings, any commitments made regarding quality of telephone service provided by competing providers and the competitive ETC's ability to provide the supported services throughout the designated service area within a reasonable time frame. With respect to designating a competitive ETC in an RTC's service area, the FCC also noted that balancing the benefits and costs from such designation is a fact-specific exercise.

The Chief ALJ concluded, with respect to the impact of Hardy's designation on the USF, that Frontier's rather general policy arguments or the CAD's more specific study area analysis were inappropriate. Frontier's argument relied heavily on the assumption that, in the future, revenues going into the fund will be at such a low level and payouts from the fund will be so high that the USF will simply not have enough money to pay its obligations or the rules must be changed significantly which would result in a reduction of the funds paid to Frontier. The Chief ALJ stated that while this may be true, it also may be true that, "in the future, Congress will decide that, rather than obtaining the USF assessment only from interstate and international revenue, the USF factor will be assessed against intrastate telecommunications revenues as well. It is also possible that, over the course of the next few years, any number of different mechanisms may be proposed and ultimately adopted by the FCC and/or Congress or even the states, which would eliminate or mitigate the worst case scenario proposed by Frontier in its briefs in this matter." *Recommended Decision* at p. 28.

The Chief ALJ also expressed various concerns with the CAD's study area analysis, which looks at support per month per line within an RTC's entire study area and compares that monthly support per line to the national average and state average

⁵*Highland Cellular, Inc.*, CC Docket No. 96-45, FCC 04-37, Memorandum Opinion and Order, (rel. April 12, 2004) (*Highland Cellular MO&O*).

telephone bill to determine whether or not the monthly support per line in a specific study area is too high to allow another ETC to be designated in that study area.⁶

The Chief ALJ found that both Frontier's and the CAD's analyses missed the mark and opined that the FCC looked at the specific impact on the USF of granting the individual ETC petition at issue. (*Quoting Highland Cellular MO&O* at para. 25 and footnote 73; and *Virginia Cellular, LLC*, CC Docket No. 96-45, FCC 03-338, Memorandum Opinion and Order, (rel. January 22, 2004), para. 31 and footnote 96 (*Virginia Cellular MO&O*). The Chief ALJ stated that Hardy potentially could receive \$355,296 per quarter, if it served all of the exchange's customers and that such amount would not burden the USF. *Recommended Decision* at p. 29.

In addressing Frontier's argument that because Hardy is not prepared to serve the remainder of the Bluefield study area, other than Hampshire, Grant and Hardy Counties, it should not be granted ETC designation, the Chief ALJ pointed out that the Bluefield study area is an extensive noncontiguous study area. The FCC concluded that requiring a carrier to serve a noncontiguous service area as a prerequisite of ETC eligibility might impose a serious barrier to entry, particularly to wireless carriers. (*Quoting Universal Service Order*, 12 FCC Rcd. 8882, para. 190 and *Virginia Cellular MO&O* at para. 38). In addition, although Hardy is not a cellular carrier, any requirement that a small telephone company who services four counties in the eastern panhandle of West Virginia must also serve counties in the extreme southern part of West Virginia hundreds of miles away from its certificated service territory would be an unconscionable and unreasonable requirement. The Chief ALJ found that Frontier consistently misstated federal law on this point. *Id.*

The Chief ALJ also addressed Frontier's argument regarding cream skimming and determined that as long as Hardy is going to be serving the entire Moorefield exchange, there is no cream skimming argument to be made. *Id.* at pp. 29-30.

Finally, the Chief ALJ stated her belief as to certain policy concerns ("policy discussion"). Specifically, she stated as follows:

⁶The Chief ALJ explained that the CAD analysis concludes that, if the monthly support per line for a specific study area is lower than the national and state average telephone bills, the costs to serve that study area are generally low enough to support an additional ETC designation. However, if the monthly support per line in the study area exceeds the national and state average residential telephone bill, the costs to serve that study area are generally too high to support another ETC designation.

there are certain policy issues relating specifically to the regulation provided by the Public Service Commission of West Virginia under the statutory scheme set forth in Chapter 24 of the West Virginia Code which no party to this proceeding has addressed. Under West Virginia Code §24-2-11(a), no public utility, person or corporation may begin the construction of any plant, equipment, property or facility for furnishing any of the services under the jurisdiction of the Public Service Commission nor apply for nor obtain any franchise, license or permit from any municipality or other governmental agency unless and until the Public Service Commission finds that the public convenience and necessity require the proposed service, construction, etc. The certificates granted to Frontier, Hardy and any other telecommunications provider in the State of West Virginia, whether they are wireless carriers or wireline carriers, interexchange carriers or CLECs, are exactly the same and the Commission had to make exactly the same finding of public convenience and necessity in order to grant them, whether or not those findings are explicitly stated in the orders. Given this similarity of certificates, the undersigned finds it discomfiting to be expected to pick and choose among carriers whose certificates have equal standing and whose services the Public Service Commission has already concluded are required by the public convenience and necessity. Denial of ETC designation to any ETC applicant in West Virginia means that the Public Service Commission is automatically placing that carrier at a financial and competitive disadvantage relative to the incumbent local exchange carrier and, possibly, previously granted ETC designees, by denying subsequent ETC applicants the same access to Universal Service Funding support as it granted to prior ETC designees or the incumbent providers. Once the Public Service Commission has concluded that the public convenience and necessity require a particular service, the undersigned is hard-pressed to understand under what legal basis under Chapter 24 of the West Virginia Code the Commission then makes an affirmative decision to discriminate between those providers by denying access to subsidy funds to some, while granting it to others.

Id. at 30.

Exceptions of Frontier

On June 1, 2004, Frontier filed "Exceptions to Recommended Decision." Frontier does not dispute that Hardy offers and advertises the services supported by universal service, as well as Lifeline and Link Up in Moorefield. Frontier disputes whether

designating Hardy an ETC in Frontier's study area is in the public interest and whether Hardy should be relieved from serving all of Frontier's Bluefield study area. Frontier has argued that Hardy does not meet the requirements to be an ETC because it cannot provide the supported services and Lifeline and Link Up throughout the Bluefield study area and does not advertise there. Further, Hardy is not certificated to provide service outside of Hardy, Hampshire and Grant Counties.

Frontier explained it had made four primary arguments as to why it was not in the public interest to designate Hardy an ETC in the Bluefield study area: 1) designation of Hardy does not advance the goals of universal service; 2) advancement of competition alone is insufficient to demonstrate that designation of Hardy is in the public interest; 3) the negative impact of such designation on the universal service fund and on universal service in West Virginia would be too great given the significant growth in the fund size and ongoing FCC rulemakings seeking ways to limit the fund's growth; and 4) Hardy engages in a kind of cream skimming by serving only the most densely populated areas in the Moorefield exchange and failing to utilize unbundled network elements (UNEs) and resale, available to it through the interconnection agreement.

Should ETC designation be granted, Frontier argued the following conditions should be imposed: 1) reducing rates by the amount of per-line USF monies received to avoid a windfall and/or in the alternative, using all USF receipts for incremental capital investment; 2) submitting to annual Commission review of its use of USF monies, including review of its infrastructure development plan; 3) taking all necessary steps to provide service to all customers who make reasonable requests by building out its own network or using UNEs or resale; and 4) designating Hardy as an ETC only for so long as the incumbent's universal service receipts are not reduced by the existence of additional ETCs in its study areas.

The following briefly summarizes Frontier's main arguments, as set forth in the exceptions. With regard to the Chief ALJ's determination of public interest, Frontier argues the finding is based on the benefits of competition and that the Chief ALJ's bottom line is that the Commission should not deny any ETC application because that would place the applicant carrier at a financial and competitive disadvantage relative to the incumbent LEC and possibly previously granted ETC designees. Frontier argues while that may be true, it is completely irrelevant. Congress made the policy decision that not every competitor or service provider operating in an RTC's area will get USF money. Frontier states that neither the Chief ALJ nor this Commission is free to substitute their policy choices for those made by Congress.

It is also Frontier's position that the Recommended Decision thwarts Congress' policy goals by misinterpreting the public interest test to involve competitive concerns and by refusing to enforce the statutory requirement that Hardy serve the entirety of Frontier's study area. Also, Frontier discussed the Act's two separate goals of advancement of competition and advance of universal service, as well as the establishment of separate schemes to advance each goal.

Frontier emphasizes that Congress did not intend for the promotion of competition to satisfy the public interest test. If that was the case, there would be no need for the test since designating additional ETCs always promotes competition. Had Congress intended for the promotion of competition to satisfy this test, it would have commanded the Commission to designate multiple ETCs in RTCs study areas.

Further, with respect to the public interest test, Frontier took issue with the fact that the Chief ALJ made no mention of the Federal-State Joint Board on Universal Service's (Joint Board) recent recommendation⁷ regarding portability of universal service funds among ETCs, wherein it addressed several issues relating to the designation process and specifically recommended several factors that the Commission should consider in evaluating the public interest test. Frontier argues that it has already fulfilled the purpose and promise of universal service in its study area. Frontier says all of the supported services are available at affordable rates. Frontier also avers that it is far from clear that Hardy is able to be the carrier of last resort, if Frontier were to withdraw as an ETC.

Frontier also believes the Commission must consider the impact on the overall size of the universal service fund in evaluating public interest. Frontier urges that focusing, as the Chief ALJ did, on the relatively small impact that any single ETC has on the overall size of the fund, is a sure way to bankrupt the fund. According to Frontier, it is the overall size of the fund and the ability to sustain its spiraling growth that will adversely impact consumers and universal service in West Virginia. It is Frontier's position that the "fact that a rural study area qualifies for high cost support is an implicit recognition that the costs of providing service in that study area are so high that the goals of universal service would not be achieved but for the support."

Frontier responded to the Chief ALJ's policy concern that it would be inconsistent with the Commission's certification of multiple carriers to find it is not in the public interest to designate any certificated carrier as an ETC. Frontier argues the public interest considerations in deciding to certificate a carrier are wholly different from those at issue

⁷*Federal-State Joint Board on Universal Service, Recommended Decision, CC Docket 96-45, FCC04J-1 (rel. Feb. 27, 2004).*

in deciding whether to designate a particular carrier to be an ETC in an RTC's service area. The fact that it may be in the public interest to certificate yet another competitor does not mean it is in the public interest to designate that carrier an ETC.

Frontier disputes that Hardy's service area should be redefined as anything other than Frontier's entire study area. Among other arguments in support of this position, Frontier says the Chief ALJ did not discuss Frontier's assertion that the prerequisite of a Joint Board recommendation has not been met. Frontier asserts that Section 214(e)(5) of the Act requires a Joint Board recommendation regarding each proposal for redefinition.

Finally, Frontier sets forth the roles of this Commission and the FCC in matters such as this. Frontier believes that the Chief ALJ failed to delineate between its authority and the FCC's authority by following FCC non-binding Section 214(e)(6) decisions instead of reaching her own conclusions.

Exceptions of the CAD

The CAD filed exceptions to the Recommended Decision on June 1, 2004. While the CAD does not object to the Chief ALJ's determination that Hardy should be designated an ETC in Frontier's Moorefield wire center, the CAD takes exception to certain of the Chief ALJ's conclusions.

First, the CAD argues the Chief ALJ erred in concluding that the CAD's public interest analysis is inappropriate. With regard to the Chief ALJ's discussion of the FCC's recent USF analysis, the CAD states she is partly right in that the FCC did not engage in the analysis of loop support by study areas advocated by the CAD here. However, the CAD says she is wrong that it is the impact of individual ETC application on the USF that the FCC considers in its public interest analysis. As did Frontier, the CAD also takes issue with the Chief ALJ's disregard of the Joint Board's recent recommendations, which endorse the public interest analysis advocated by the CAD. Regarding the FCC's purported review of the impact on the USF of individual ETC applications, the FCC made clear it must weigh numerous factors including the impact of multiple designations on the USF. In light of the size of the high-cost portion of the USF (\$32 billion annually), very few individual ETC designations would ever have a significant impact. The CAD says analyzing the impact of one carrier's ETC designation on the entire high-cost portion of the fund is useless, but that is what the Chief ALJ did. Under her analysis, it would presumably be in the public interest to designate an unlimited number of ETCs in any given area.

The CAD says that rather than base the public interest cost benefit analysis on the absolute individual cost of each ETC, the Commission should adopt the CAD's straightforward relative cost analysis, which considers the number of lines served to receive the absolute level of support for each study area. Rather than look at the population density (as the FCC has done) of the portions of Frontier's Bluefield study area affected as an indirect indicator of cost to serve, the CAD looks at per-loop support levels in these areas. The CAD cites to the Joint Board's recent recommendations to the FCC as support for its approach.

The CAD also responded to the Chief ALJ's discomfort, in light of the *Easterbrooke Cellular Corporation* case decided the same day⁸, and states that there is nothing "peculiar" about its use of per-line support averaged over a study area rather than focused on a particular wire center. The CAD says the Chief ALJ's distress stems from a fundamental misunderstanding of the importance of study areas for purposes of universal service support and ETC designations and explains its reasons in support thereof.

Second, the CAD declares that the Chief ALJ's suggestion that, as a policy matter, there is no basis to discriminate between carriers as part of the public interest determination is patently inconsistent with Section 214(e)(2) of the Act. The CAD believes this is perhaps the most troubling aspect of the Chief ALJ's decision. The CAD asserts the Chief ALJ is not empowered to question the policies underlying the Act's provisions regarding universal service and ETCs. The Act expressly commands the Commission to choose – to make a public interest determination – whether multiple ETCs should be designated in rural study areas. That public interest determination is not resolved simply because a carrier is certificated by the Commission. The Commission has certificated over 100 competitive LECs. Under the Chief ALJ's reasoning, every single one of these carriers is entitled to ETC status, even in rural areas. The CAD states the Chief ALJ's reasoning makes a mockery of the ETC process and ignores the fact that issuance of a certificate by the Commission imposes no particular obligations upon a carrier, whereas ETC status imposes rigorous obligations.

Third, the Chief ALJ erred in failing to address the CAD's recommendation that Hardy's ETC designation should include its certificated service area in Hardy, Grant and Hampshire Counties. The CAD believes that Hardy's designation should not be limited

⁸Case No. 03-0935-T-PC. There, the CAD recommended Easterbrooke not be designated an ETC in Frontier's Mountain State study area, which receives average support over the study area only slightly higher than the amount of support assigned to the Moorefield wire center under the disaggregation plan.

to the Moorefield exchange, rather it should be designated an ETC in all those exchanges in Frontier's Bluefield study area in which it is certificated.⁹ The CAD argues there is no reason Hardy cannot provide competitive service in the additional Frontier exchanges and that the Commission would be spared entertaining the piecemeal ETC applications by Hardy as it introduces service in each exchange. Although the CAD agrees that requiring Hardy to serve the entire Bluefield study area would impose an unreasonable burden on the company, forcing it to serve the geographically contiguous areas where it has already received a certificate would not.

Hardy's Motion for Expedited Decision

On June 8, 2004, Hardy filed a motion for an expedited decision. In support of its motion, Hardy states that continued delay in filing the appropriate petition with the FCC seeking concurrence in the redefinition of the service area causes irreparable harm on Hardy. Hardy discussed the upcoming FCC and Universal Service Administrative Company (USAC) deadlines for eligibility.

Frontier's Reply to the CAD's Exceptions

On June 11, 2004, Frontier filed a reply to the CAD's exceptions. Frontier agrees with the CAD that the Chief ALJ erred in not discussing the Joint Board's recommendations regarding ETC designations. Frontier again addresses the growth in the universal service fund and reiterates the Joint Board recommendations for addressing the problem. Frontier believes the Chief ALJ failed to fulfill the Commission's statutory obligation to make a public interest determination and that this failure flows from the Chief ALJ's refusal to accept Congress' policy decision that not every applicant should be designated an ETC and not every study area should have multiple ETCs.

Frontier reiterates its position that public interest must be evaluated in universal service terms, not competitive terms. Frontier agrees with the CAD that it is appropriate to consider the amount of per-line USF flowing into a study area when evaluating public interest. Frontier disagrees, however, regarding the levels of per-line USF support at which it is not in the public interest to designate additional ETCs. Frontier also asserts the Commission should consider the impact on universal service throughout the study area that would result from reducing the USF receipts of the only ETC that serves the entire

⁹The additional exchanges covered by this proposal would be Wardensville (Hardy County), Petersburg and Maysville (Grant County) and Romney, Augusta, Levels and Capon Bridge (Hampshire County).

area and that at a minimum, any designation should be conditioned on there being no further reduction in USF receipts to Frontier.

As in its exceptions, Frontier again sets forth its arguments against the redefinition of Hardy's service area.

DISCUSSION

Pursuant to the Telecommunications Act of 1996, designation as an ETC is essential for common carriers of telecommunications services to be eligible to receive federal universal service support pursuant to 47 U.S.C. § 254. To be designated as an ETC, an applicant must (1) be a common carrier; (2) offer the services supported by the federal universal service support mechanism under 47 U.S.C. § 254(c), either using its own facilities or a combination of its own facilities and resale, throughout the designated service area; (3) advertise the availability of such services and the charges therefor, using media of general distribution. 47 U.S.C. §§ 214(e)(1)(A)&(B); and (4) offer Link Up and Lifeline services to low-income subscribers. See 47 C.F.R. §§ 54.405 and 54.411.

47 U.S.C. § 214(e)(2) establishes the process to designate eligible telecommunications carriers as follows:

A State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the State commission. Upon request and consistent with the public interest, convenience, and necessity, the State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest.

The supported services which the ETC applicant must provide are 1) voice grade access to the public switched telephone network; 2) local usage; 3) dual-tone multi-frequency (DTMF) signaling or its functional equivalent; 4) single party service or its functional equivalent; 5) access to emergency services; 6) access to operator services; 7)

access to interexchange services; 8) access to directory assistance; and 9) toll limitation for qualifying low-income customers. *See* 47 C.F.R. § 54.101(a). The applicant also must advertise the availability of these services throughout its service territory. If the incumbent local exchange carrier is a rural telephone company, the applicant seeking ETC status also must demonstrate that designating it as an ETC is in the public interest.

The Public Service Commission adopted general criteria for the advertising requirement in its Order of May 4, 2001, in Case No. 00-1656- T-PC, *Gateway Telecom, LLC, dba StratusWave Communications*, as follows:

1. The carrier must advertise in media targeted to the general residential market throughout its service area;
2. Such advertising should be placed in media substantially similar to the media in which the serving incumbent LEC advertises its services in the particular service area. This may mean newspaper or local magazine advertisements where the incumbent advertises its services in such publications, or use of broadcast media (radio or television) where the incumbent uses such media;
3. The carrier is required to maintain an Internet site where members of the public can obtain information regarding its services and rates; and
4. The carrier is required to advertise its services at least quarterly throughout the service areas for which it has been designated an ETC.

The FCC's regulations on the service area of an ETC are contained in 47 C.F.R. § 54.207, as follows:

- (a) The term service area means a geographic area established by a state commission for the purpose of determining universal service obligations and support mechanisms. A service area defines the overall area for which the carrier shall receive support from federal universal service support mechanisms.
- (b) In the case of a service area served by a rural telephone company, service area means such company's "study area" unless and until the Commission [the FCC] and the states, after taking into account recommendations of a Federal-State Joint Board instituted under section

410(c) of the Act, establish a different definition of service area for such company.

(c) If a state commission proposes to define a service area served by a rural telephone company to be other than such company's study area, the Commission will consider that proposed definition in accordance with the procedures set forth in this paragraph.

(1) A state commission or other party seeking the [FCC's] agreement in redefining a service area served by a rural telephone company shall submit a petition to the [FCC]. The petition shall contain:

- (i) The definition proposed by the state commission; and
- (ii) The state commission's ruling or other official statement presenting the state commission's reasons for adopting its proposed definition, including an analysis that takes into account the recommendations of any Federal-State Joint Board convened to provide recommendations with respect to the definition of a service area served by a rural telephone company.

Within 14 days after receiving the state commission's redefinition proposal, the FCC will issue a public notice of the proposal. 47 C.F.R. § 54.207(c)(2). The FCC then has 90 days within which to decide whether to initiate a proceeding regarding the proposal; if the FCC fails to initiate a proceeding within 90 days after the release of its public notice, the state commission's proposal is deemed approved and may take effect according to state procedure. 47 C.F.R. § 54.207(c)(3). If the FCC decides to initiate a proceeding, then the state's redefinition will not take effect until the two agencies agree on a definition. *Id.*

Public Interest Analysis

It is undisputed that Hardy offers and advertises each of the supported services, as well as Lifeline and Link Up, in Moorefield. Therefore, since Frontier is an RTC and in

accordance with 47 U.S.C. § 214(e)(2), we are faced with whether designating Hardy as an ETC in Frontier's areas is in the public interest. This issue has been and continues to be the most debated of all in this case. We conclude, as did the ALJ, that Hardy has met its burden of proof and that such designation is in the public interest.

We note our agreement with Frontier's argument that competition alone is an insufficient basis to support a finding of public interest. Although a specific definition of "public interest" has never squarely been addressed, we believe this to be a fact specific analysis. We have considered whether the benefits of designating Hardy as an ETC in Frontier's areas outweigh any potential harms. In doing so, we considered numerous factors including, but not limited to, the benefits of competitive choice, differences in service offerings, differences in service availabilities, commitments regarding quality of service, commitments regarding providing service upon request and agreements to a level of regulation greater than that imposed by the FCC and other states.

We acknowledge the CAD's arguments with respect to its proposed public interest analysis, namely the consideration of the per loop support by study areas. We recognize that the CAD, under such analysis, determined it was in the public interest to designate Hardy as an ETC. While we will not adopt the CAD's approach at this time, we believe that it is a valid attempt to apply some objective measure to the public interest analysis and should be considered in future cases. However, we note that there are several implications and potentially conflicting outcomes of the CAD's "bright line" for determining when ETC status for competing carriers is contrary to the public interest that must be further developed before we adopt any "bright line" objective test.

We acknowledge that one argument in support of the CAD per loop support "bright line" is that the public interest may be best served when competition in an extremely high cost study area comes from technology that is innovative and/or lower in cost than the incumbent high cost technology. However, high cost support that is based on the incumbent's high cost technology may encourage replication of such costly investment. This replication may not be desirable. Therefore, the prospect of this outcome may tend to support the CAD's suggested finding that providing ETC status in an exceptionally high cost study area would not be in the public interest. On the other hand innovative, lower cost technology may be available, but not at a cost so low as to be at or below the net (after high cost support) cost to the incumbent. Under this scenario, to deprive the new technology of any support at all creates a non-level playing field and may stifle the new technology.

A second, and perhaps more important, consideration for not adopting the CAD's per line support test at this time is the methodology currently used for administration of the high cost fund. We can appreciate the CAD's position as it relates to potential impact on the incumbent carrier in extremely high cost study areas. The incumbent has made significant investments to provide extended service throughout its service area. When such investment in some wire centers is so costly as to require large payments from the federal fund to support universal service, then loss of customers to subsidized competing carriers may have significant impacts on remaining incumbent customers in both high cost and low cost wire centers if there is a comparable loss of high cost support. Furthermore these impacts are much greater as the per loop costs increase. However, at the present time, the methodology for administration of the federal high cost fund is such that the incumbent will not lose high cost support if it loses customers to a competing carrier. Accordingly, the potential for an outcome that is contrary to the public interest when competing carriers receive ETC status in extremely high cost study areas will not occur under the present funding procedures. As we explain below, we are authorizing ETC status for Hardy only under the current methodology for administration of the federal high cost fund. If this methodology changes, then we shall reconsider the public interest of ETC designation.

For the numerous reasons discussed by the Chief ALJ, we find the public interest will be served by Hardy's ETC designation in the Moorefield exchange. We also believe that public health and safety would benefit in situations where wire line service is unavailable.

Anti-competitive concerns were also considered, including the impact of the designation on the USF. We acknowledge the Joint Board's recommendations concerning the process for designation of ETCs and the rules regarding high-cost universal service support¹⁰ and recognize that the impact on the fund is a significant concern and a factor to be considered. We agree with Frontier and the CAD that the Chief ALJ's conclusion, that the impact of the individual ETC petition on the USF is to be considered, is erroneous. On the other hand, we agree with the Chief ALJ's statement that while Frontier's speculations as to the impact upon and the future of the USF fund may be true, it may be true that Congress may decide the USF factor will also be assessed against intrastate telecommunications revenues. We also agree it may be possible that, over the course of the next few years, any number of different mechanisms may be proposed and ultimately adopted by the FCC and/or Congress or even the states, which would eliminate or mitigate the worst case scenario proposed by Frontier.

¹⁰See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Recommended Decision, FCC 04J-1 (rel. Feb. 27, 2004).

On June 8, 2004, the FCC issued a Notice of Proposed Rulemaking, seeking comments on the Joint Board's recommendations.¹¹ Also in June, the FCC asked the Joint Board on Universal Service to review the Commission's rules relating to the high-cost universal service support mechanisms for rural carriers and to determine the appropriate rural mechanism to succeed the five-year plan adopted in the previous *Rural Task Force Order*, particularly asking for recommendations on a long-term universal service plan that ensures that support is specific, predictable, and sufficient to preserve and advance universal service.¹²

We recognize and share in the concerns regarding the overall impact to the fund through the designation of additional ETCs in rural carriers' service areas, however, the issue is being addressed at the federal level. While Frontier's assertions regarding the fund have merit, they do not warrant rejection of Hardy's petition at this time. We acknowledge that the outcome of the federal proceedings could affect the ETC designation process, as well as the support that ETCs may receive in the future. However, projections regarding future changes are only speculative at this time. Under the current law, we conclude that Hardy's designation as an ETC would be in the public interest. Nevertheless, with knowledge of the ongoing federal proceedings, we also conclude it is reasonable to make Hardy's designation subject to review, if and when the federal rules and regulations change.

In its exceptions, Frontier reiterated the four conditions it proposed in this case, as quoted above, should ETC designation be granted in this. We decline to adopt the conditions, as proposed. However, there are additional requirements, two of which are similar in nature to those proposed, which we will impose upon Hardy. Those will be stated more fully later in this Order. We believe that the conditions, as well as the annual re-certification process, are sufficient to protect the public interest.

¹¹See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Notice of Proposed Rulemaking, FCC 04-127 (rel. June 8, 2004).

¹²See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order, FCC-04-125 (rel. June 28, 2004).

Designated Service Area Analysis

As Hardy's ETC designation is in the public interest, we must determine whether it is appropriate to redefine Frontier's service territory for the purpose of this proceeding. As explained in the Recommended Decision, the Chief ALJ granted Hardy ETC status in the Moorefield exchange of Frontier's Bluefield study area, with the requirement that Hardy provide service throughout all of the Moorefield exchange, either through its own facilities or a combination of its own and Frontier's facilities. In her analysis, the Chief ALJ addressed Frontier's arguments that Hardy should serve the entire Bluefield study area and that Hardy is attempting to cream skim Frontier's territory.

With regard to the redefinition process, we reject Frontier's analysis. 47 C.F.R. § 54.207, as set forth above, states that a "service area means such company's 'study area' unless and until the Commission [the FCC] and the states, after taking into account recommendations of a Federal-State Joint Board . . . establish a different definition of service area for such company." Frontier misreads Section 214(e)(5) in asserting that the Joint Board must be convened each time a service area redefinition request is received. This section merely requires a Joint Board's recommendations be taken into account.

We agree with the Chief ALJ's reasoning with regard to redefinition and will adopt the same. For the reasons set forth in the Recommended Decision, we further concur with the Chief ALJ's determination and analysis that Hardy is not attempting to skim the cream. Finally, we recognize that redefinition in this case is subject to the FCC's concurrence. Thus, Staff should proceed with filing the appropriate petition for such concurrence.

Additional Requirements

While we adopt the ALJ's decision to grant Hardy's petition for ETC designation in the Moorefield exchange, we also find it reasonable to impose certain additional requirements.

A general investigation, Case No. 03-1199-T-GI, was instituted with regard to the establishment of conditions for the granting of ETC status to carriers and the establishment of uniform standards for determining ETC compliance with applicable federal requirements regarding the use of federal USF money provided to them. The general investigation is pending. Should requirements be established as a result of that case which are not imposed at this time, Hardy must comply with any such additional requirements.

Hardy's ETC designation shall be subject to the Commission's annual review of the amount of USF monies received and the use of such funds. Specifically, the usage of the funds will be considered by this Commission as a factor in the annual re-certification process.

Chief ALJ's Policy Concerns

We agree with the exceptions of Frontier and the CAD regarding the Chief ALJ's discussion of certain policy issues, as quoted above and set forth in the Recommended Decision at page 30. Of particular concern to this Commission is the Chief ALJ statement that it is

...discomfiting to be expected to pick and choose among carriers whose certificates have equal standing and whose services the Public Service Commission has already concluded are required by the public convenience and necessity. Denial of ETC designation to any ETC applicant in West Virginia means that the Public Service Commission is automatically placing that carrier at a financial and competitive disadvantage relative to the incumbent local exchange carrier and, possibly, previously granted ETC designees, by denying subsequent ETC applicants the same access to Universal Service Funding support as it granted to prior ETC designees or the incumbent providers. Once the Public Service Commission has concluded that the public convenience and necessity require a particular service, the undersigned is hard-pressed to understand under what legal basis . . . the Commission then makes an affirmative decision to discriminate between those providers by denying access to subsidy funds to some, while granting it to others.

We disagree and reject this portion of the Recommended Decision for the reasons discussed by the CAD and Frontier. Specifically, we agree with Frontier that the public interest considerations in deciding to certificate a carrier are wholly different from those at issue in deciding whether to designate a particular carrier to be an ETC in an RTC's service area. The fact that it may be in the public interest to certificate yet another competitor does not mean it is in the public interest to designate that carrier an ETC. We also agree with the CAD that the Chief ALJ cannot override Congress' policy decision that not every provider in RTCs' areas will get USF money (i.e. it must be in the public interest) and that the public interest determination is not resolved just because a carrier

is certificated. Thus, the CAD and Frontier's exceptions will be granted to the extent they address this issue. Nevertheless, rejection of the ALJ's language does not change the outcome of the decision.

Additional Issues

Regarding the CAD's Proposed Additional Designation

On exception, the CAD complains that the Chief ALJ erred in failing to address the CAD's recommendation that Hardy's ETC designation should also include its certificated service area in Hardy, Grant and Hampshire Counties. The CAD believes there is no reason Hardy cannot provide competitive service in the additional Frontier exchanges. Although the Commission appreciates the CAD's concern with its being "spared entertaining the piecemeal ETC applications by Hardy as it introduces service in each exchange," the fact remains that Hardy petitioned only for ETC designation in the Moorefield exchange. Thus, the CAD's exception on this issue is denied.

Regarding Compliance with W. Va. Code § 24-2-11

We note that by Recommended Decision in Case No. 01-0765-T-CN (entered Sept. 27, 2001; final Oct. 17, 2001), Hardy was granted a certificate of convenience and necessity to provide facilities-based local exchange telecommunications services in those portions of Grant, Hampshire, Hardy and Pendleton Counties. It was further ordered, however, that the authority granted "does not constitute approval to construct specific facilities for the provision of telecommunications services and that, in the event Hardy develops a plan for constructing facilities for the provision of telecommunications services in the New Area in the future, it must provide the Commission with complete details thereof and obtain consent and approval thereof prior to construction."

In addition, pursuant to *W. Va. Code § 24-2-11*, no public utility "shall begin the construction of any plant, equipment, property or facility for furnishing any of the services enumerated in section one . . . , article two of this chapter . . . except ordinary extensions of existing systems in the usual course of business, unless and until it shall obtain from the public service commission a certificate of public convenience and necessity"

We are unaware that Hardy has ever filed for a certificate for construction, as required in accordance with that above. We take this opportunity to note to Hardy that should construction occur in the future, which is not the ordinary extension of an existing system, permission must first be obtained from this Commission.

FINDINGS OF FACT

1. On March 3, 2003, Hardy filed a petition, pursuant to Section 214(e)(2) of the Act, requesting designation as an ETC for the receipt of support from the federal universal service program only in Frontier's Moorefield exchange, in Frontier's Bluefield study area.

2. On April 25, 2003, this matter was referred to the ALJ Division.

3. A Recommended Decision was entered on May 14, 2004, granting Hardy's petition for ETC designation in the Moorefield Exchange. The Chief ALJ conditioned the designation upon the following: 1) Hardy shall serve the entire Moorefield exchange, either through its own facilities or a combination of its own and Frontier's facilities; 2) Hardy shall comply with the advertising requirements established in this Commission's *Gateway* decision; and 3) Hardy shall comply with any other restrictions or requirements imposed upon ETC designees in *Highland Cellular*. The Chief ALJ also ordered Staff to file the appropriate petition with the FCC, within 60 days, seeking concurrence in the redefinition of Hardy's service area for ETC purposes as being the entirety of Frontier's Moorefield exchange.

4. On June 1, 2004, Frontier filed exceptions to the Recommended Decision, stating that it does not dispute that Hardy offers and advertises the services supported by universal service, as well as Lifeline and Link Up in Moorefield.

5. Frontier disputes whether designating Hardy an ETC in Frontier's study area is in the public interest and whether Hardy should be relieved from serving the entirety of Frontier's Bluefield study area.

6. The CAD filed exceptions to the Recommended Decision on June 1, 2004. While the CAD does not object to the Chief ALJ's determination that Hardy should be designated an ETC in Frontier's Moorefield wire center, the CAD takes exception to certain of the Chief ALJ's conclusions.

7. On June 8, 2004, Hardy filed a motion for an expedited decision.

8. On June 11, 2004, Frontier filed a reply to the CAD's exceptions.

CONCLUSIONS OF LAW

1. We disagree with and reject the Chief ALJ's discussion of certain policy issues, as quoted above and set forth in the Recommended Decision at page 30 (policy discussion). Frontier's and the CAD's exceptions will be granted with respect to this issue.

2. The CAD's public interest analysis, namely the consideration of the per loop support by study areas, should not be adopted at this time for the reasons discussed hereinabove.

3. It is reasonable to adopt the ALJ's finding and reasons in support thereof, as set forth in the Recommended Decision, that designating Hardy is in the public interest.

4. 47 C.F.R. § 54.207 does not require that the Joint Board must be convened each time a service area redefinition request is received. This section merely requires a Joint Board's recommendations be taken into account.

5. It is reasonable to adopt the ALJ's finding and reasons in support thereof, as set forth in the Recommended Decision, that Hardy's service area for ETC purposes should be defined as the Moorefield exchange.

6. In accordance with 47 C.F.R. § 54.207, FCC concurrence must be obtained regarding the redefinition of service areas. Accordingly, Staff should file the appropriate petition seeking such concurrence.

7. Given the manner in which the USF currently operates, the proposition that the impact of individual ETC petitions on the USF is to be considered in determining this particular application, is not significant.

8. While the impact to the USF through the designation of additional ETCs in rural carriers service areas is a concern to be considered, the issue is being addressed at the federal level and does not warrant rejection of Hardy's petition at this time.

9. With knowledge of the ongoing federal proceedings, it is reasonable to make Hardy's designation subject to review, if and when the federal rules and regulations change.

10. In addition to the conditions set forth in the Recommended Decision, it is reasonable to require Hardy to comply with additional requirements, including the following: Hardy shall comply with any additional requirements which may be established in Case No. 03-1199-T-GI, which is now pending, and Hardy shall submit to this Commission's annual review of the amount of USF monies received and the use of such funds. Specifically, the usage of the funds will be considered by this Commission as a factor in the annual re-certification process.

11. It is reasonable to deny the CAD's proposal that Hardy's ETC designation should also include Hardy's certificated service area in Hardy, Grant and Hampshire Counties.

12. Hardy is required, pursuant to prior Commission order and *W. Va. Code* § 24-2-11, to obtain a certificate for construction which is not an ordinary extension of an existing systems

ORDER

IT IS, THEREFORE, ORDERED that Citizens Telecommunications of West Virginia dba Frontier Communications of West Virginia's exceptions are granted only to the extent set forth in the Discussion and Conclusions of Law. The remainder of Frontier's exceptions are denied.

IT IS THEREFORE ORDERED that the Consumer Advocate Division's exceptions are granted only to the extent set forth in the Discussion and Conclusions of Law. The remainder of the CAD's exceptions are denied.

IT IS FURTHER ORDERED that the portion of the Recommended Decision which suggests that, as a policy matter, there is no basis to discriminate between carriers as part of the public interest determination, is hereby rejected.

IT IS FURTHER ORDERED that the remainder of the Recommended Decision, entered on May 14, 2004, is hereby adopted and the following additional conditions are imposed:

- Hardy Telecommunications Inc. shall comply with any additional requirements which may be established as a result of Case No. 03-1199-T-GI, which is now pending; and

- Hardy Telecommunications Inc. shall submit to this Commission's annual review of the amount of USF monies received and the use of such funds. Specifically, the usage of the USF funds will be considered by this Commission as a factor in the annual re-certification process.

IT IS FURTHER ORDERED that Hardy Telecommunications Inc.'s ETC designation, as granted herein, shall be subject to review if and when the federal rules and regulations are modified by the Federal Communications Commission.

IT IS FURTHER ORDERED that within sixty (60) days of the date of Order, Commission Staff shall file the appropriate petition with the Federal Communications Commission pursuant to Section 214(e) of the Communications Act of 1934, as amended, seeking FCC concurrence in the redefinition of Hardy Telecommunications Inc.'s service area for eligible telecommunications carrier purposes as being the Moorefield exchange.

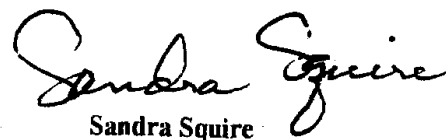
IT IS FURTHER ORDERED that within the same sixty-day period, the Commission Staff shall provide to the Federal Communications Commission and the Universal Service Administrative Company a certified copy of this Order designating Hardy Telecommunications Inc. as an eligible telecommunications carrier for the Moorefield exchange.

IT IS FURTHER ORDERED that, upon entry hereof, this proceeding shall be removed from the Commission's active docket of cases.

IT IS FURTHER ORDERED that the Commission's Executive Secretary serve a copy of this order upon all parties of record by United States Certified Mail, return receipt requested, and upon Commission Staff by hand delivery.

TBS/ljm
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A True Copy, Teste:


Sandra Squire
Executive Secretary